

Notice: This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
EMPLOYEE <sup>1</sup> ,	)	OEA Matter No. 1601-0022-23
	)	
v.	)	Date of Issuance: June 5, 2023
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF CORRECTIONS,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
_____	)	
Employee, <i>Pro Se</i>	)	
Andrea Comentale, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On January 18, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Corrections’ (“DOC” or “Agency”) decision to terminate her from her position of Case Manager, effective December 19, 2022. OEA issued a Request for Agency Answer to Petition for Appeal on January 19, 2023. Agency filed its Motion to Dismiss Employee’s Petition for Appeal on February 6, 2023, stating that Employee filed a grievance with the Union on December 29, 2023, prior to filing her appeal with OEA. Thus, Agency asserted that OEA lacked jurisdiction over this matter. Agency did not file an Answer to the Petition for Appeal.

I was assigned this matter on February 9, 2023. Thereafter, I issued an Order on February 16, 2023, requiring Employee to address the jurisdictional issue raised by Agency in its Motion to Dismiss. Employee’s brief on jurisdiction was due on or before March 3, 2023, and Agency had the option to file a reply brief on or before March 17, 2023. On March 2, 2023, Employee filed a request to extend the filing deadline so she could retain counsel. This request was granted in an Order issued March 8, 2023. Pursuant to this Order, Employee’s filing deadline was extended to April 7, 2023, and Agency had the option to file a reply brief on or before April 21, 2023. While Employee timely filed her jurisdiction

<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

brief on April 5, 2023, as of the date of this decision, Agency has not filed a reply brief. Because I determined that this matter could be decided on the basis of the documents of record, no proceedings were conducted. The record is now closed.

### JURISDICTION

The jurisdiction of this Office, pursuant to D.C. Official Code § 1-606.03 (2001), has not been established.

### ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

### BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations (“DCMR”) Ch. 600, et seq (December 27, 2021) states:

The burden of proof for material issues of fact shall be by a preponderance of the evidence. “Preponderance of the evidence” shall mean:

the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.<sup>2</sup>

OEA Rule § 631.2 *id.* states:

For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

### ***Employee’s Position***

Employee argued in her April 5, 2023, submission that OEA has jurisdiction over her appeal because the union chairperson, Sergeant Alexander, filed the December 29, 2022, grievance without her express consent or knowledge. Employee explained that on December 15, 2022, she informed the Union Chairperson that she would like to appeal her termination by way of arbitration through the Union. She averred that Sergeant Alexander told her to get everything she had together so that the union could decide if her case would be accepted for arbitration. Employee provided the union a copy of the requested documents.

Additionally, Employee asserted that on December 28, 2022, she informed Sergeant Alexander that if the union could not appeal her termination through the union arbitration process, then they should pursue the option of appealing her termination via OEA. According to Employee, she had a telephone conversation with Sergeant Alexander later that day wherein, he expressed that the Union might not be

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<sup>2</sup> OEA Rule § 699.1.

able to represent Employee in arbitration because she only started paying her union dues after she was placed on administrative leave. Employee contended that she informed Sergeant Alexander that that was not true. She claimed that she verbally informed Sergeant Alexander that since she's already been considering OEA, she will go that route. Per Employee, Sergeant Alexander said he would check with the Executive Secretary to confirm when Employee started paying Union dues and he would get back to Employee, but he never followed up with her. However, Employee stated that on December 29, 2022, she received a text from Sergeant Alexander stating that he had filed the formal grievance to Agency's Director, and she was under the impression that the union had decided they would represent her in arbitration. Employee cited that she only received Agency Director's January 5, 2023, Decision via Agency's February 6, 2023, Motion to Dismiss. Employee further explained that she reached out to Sergeant Alexander via text message on January 13, 2023, to inquire if he had received a response from the Director and requested a copy of the grievance. Sergeant Alexander responded on January 14, 2023, that the Director had not responded, and he suggested that Employee file an appeal with OEA.<sup>3</sup>

### ***Agency's Position***

Agency asserted in its Motion to Dismiss that OEA lacks jurisdiction over Employee's appeal because Employee decided to file a grievance with her designated Union, Fraternal Order of Police, Department of Corrections Labor Committee ("FOP-DOC"), on December 29, 2022, prior to filing her current appeal with the OEA on January 18, 2023. Agency stated that it received Employee's formal grievance on December 29, 2022, and issued a formal response to Employee on January 4, 2023. Agency further cited that pursuant to D.C. Official Code §1-616.52 (2001), Employee's decision to file a grievance with her Union, prior to filing her current appeal with the OEA, removed the OEA's jurisdiction over her appeal.<sup>4</sup>

Agency maintained that Employee acknowledged in her Petition for Appeal that she filed a grievance with Agency with respect to the instant claim. It noted that Employee was informed of her right to grieve the final decision of her termination through the negotiated grievance procedures set forth in Articles 10 and 11 of the Collective Bargaining Agreement ("CBA") between the Agency and the FOP-DOC; or appeal to the OEA. Employee was also advised that she may elect only one (1) of the grievance procedures and once selected the grievance procedure was binding. Employee elected to appeal her termination by filing a grievance with her Union before filing the instant Petition for Appeal with OEA. By doing so, Employee waived her rights to be heard by the OEA.<sup>5</sup>

### **ANALYSIS AND CONCLUSIONS OF LAW<sup>6</sup>**

The threshold issue in this matter is one of jurisdiction. This Office has no authority to review issues beyond its jurisdiction.<sup>7</sup> Therefore, issues regarding jurisdiction may be raised at any time during

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<sup>3</sup> Employee incorrectly captioned her response to the Jurisdiction Order as "Employee's Petition for Appeal". See April 5, 2023, submission.

<sup>4</sup> Agency's Motion to Dismiss (February 6, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

the course of the proceeding.<sup>8</sup> This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code §1-601-01, *et seq.* (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to Title 6-B of the District of Columbia Municipal Regulation ("DCMR") § 604.1<sup>9</sup>, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating resulting in removal;
- (b) *An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more;* or
- (c) A reduction-in-force; or
- (d) Placement on enforced leave for 10 days or more (emphasis added).

In the instant matter, Agency argued that OEA did not have jurisdiction over this matter because Employee filed a grievance with her union prior to filing an appeal with OEA. Employee on the other hand averred in her April 5, 2023, submission that OEA has jurisdiction over her appeal because the union chairperson - Sergeant Alexander, filed the December 29, 2022, grievance without her expressed consent or knowledge. However, I find that this contention is belied by the record.

D.C. Official Code §1-616.52 (2001) reads (in pertinent part) as follows:

(d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for employees in a bargaining unit represented by a labor organization. If an employee does not pay dues or a service fee to the labor organization, he or she shall pay all reasonable costs to the labor organization incurred in representing such employee. organization.

(e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to Section 1-606.03, or the negotiated grievance procedure, **but not both**. (Emphasis added).

(f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, **whichever event occurs first**. (Emphasis added).

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<sup>7</sup> See *Banks v. District of Columbia Public School*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).

<sup>8</sup> See *Brown v. District of Columbia Public School*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).

<sup>9</sup> See also, Chapter 6, §604.1 of the District Personnel Manual ("DPM") and OEA Rules.

OEA has consistently held that it lacks jurisdiction to adjudicate an appeal when an employee elects to grieve a matter through their union prior filing an appeal with this Office.<sup>10</sup> Here, Employee does not dispute that she was a member of a union. Additionally, there is evidence in the record to support Agency's assertion that the union chairperson, Sergeant Alexander filed a grievance on Employee's behalf on December 29, 2022.<sup>11</sup> Furthermore, the record reflects, and Employee admitted in her April 5, 2023, filing that she contacted Sergeant Alexander on December 15, 2022, and requested that he file a grievance on her behalf. Specifically, Employee stated in her submission that "[o]n the 15th of December 2022 I informed Sergeant Alexander of the Directors' decision and *advised him I would like to appeal by way of arbitration through the Union.*"<sup>12</sup> (Emphasis added). Additionally, Employee provided the union with the documentation required to appeal her termination via the grievance process.

Employee, by her own admission in her Petition for Appeal, stated that she was a member of the Fraternal Order of Police at the time she was terminated. When asked whether she previously filed an appeal, grievance, or complaint with an agency, Employee responded "yes."<sup>13</sup> There is also evidence in the record to prove that the union notified Employee that it had filed the grievance on her behalf. Moreover, in a written exchange between Employee and Sergeant Alexander, dated January 13 - 14, 2023, approximately two (2) weeks after the union filed a grievance on Employee's behalf, Employee texted Sergeant Alexander as follows: "... just checking in to see if there is any word from Mr. Faust regarding my grievance. Also, can you send me a copy of the grievance. ..."<sup>14</sup> (Emphasis added). Based on the foregoing, I find that Employee initiated the grievance process when she contacted the union on December 15, 2022, to request that they appeal her termination via the arbitration process. There is no evidence in the record to indicate that Employee rescinded her authorization for the union to act on her behalf. Therefore, the undersigned concludes that the FOP-DOC was authorized to file the December 29, 2022, grievance for Employee. Accordingly, I find that Employee's assertion that the union filed the grievance without her knowledge or express consent is disingenuous.

While Employee asserted that she had a change of mind regarding the union filing the grievance on her behalf, and she verbally communicated the same to Sergeant Alexander during their telephone conversation on December 28, 2022, but for the phone log she submitted, the record is void of any such communication. Further, although there is evidence in the record to prove that Employee at some point prior to the filing of the grievance contemplated which appeal route to take – grievance through the union or appeal through OEA, apart from her self-serving assertion, nothing in the record demonstrates that she rescinded her authorization during the December 28, 2022, telephone conversation or prior to the union filing the grievance on December 29, 2022. Moreover, Employee did not reach out to the union to request that the grievance be withdrawn as she alleges that it was filed against her wishes. Instead, on January 13, 2023, she reached out to the union to discuss the status of her grievance. She also discussed the issue of her union dues and the impact it could have on the outcome of the grievance, but nothing was said about Sergeant Alexander violating her verbal request to not file a grievance on her

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<sup>10</sup> *Boyd v. D.C. Public Schools*, OEA Matter No. J-0002-08 (August 6, 2008); *Boone v. D.C. Public Schools*, OEA Matter No. J-0293-10 (January 10, 2011); *Alonseza Belt v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0244-10 (March 31, 2014); *Charles Brown v. Department of Human Services*, OEA Matter No. 1601-0058-07, Opinion and Order on Petition for Review (November 23, 2009); *Taylor v. D.C. Public Schools*, OEA Matter No. 1601-0206-12 (June 26, 2014); and *Bustamante v. Department of the Environment*, OEA Matter No. 1601-0049-12 (July 23, 2012).

<sup>11</sup> Agency's Motion to Dismiss at Exhibit 4.

<sup>12</sup> Employee's April 5, 2023, Petition for Appeal.

<sup>13</sup> Employee's Petition for Appeal, *supra*, at pg. 6 of 6, Question No. 29.

<sup>14</sup> Employee's April 5, 2023, Petition for Appeal at Attachment 8.

behalf, and that she would file an appeal with OEA instead. She filed her Petition for Appeal with OEA close to three (3) weeks after the union filed the grievance on her behalf, and a few days after she was informed by the union that her case was not strong enough to go to arbitration.<sup>15</sup>

Pursuant to the above-referenced code section, Employee had the option to appeal her demotion claim with either OEA or through her Union, **but not both**. (Emphasis added). Employee elected to appeal her termination by filing a grievance with her Union, several weeks before filing the instant Petition for Appeal with OEA. By doing so, Employee waived her rights to be heard by this Office. Based on the foregoing, I conclude that this Office does not have jurisdiction over Employee's appeal.

### **ORDER**

It is hereby **ORDERED** that Agency's Motion to Dismiss is **GRANTED**; and it is

**FURTHER ORDERED**, that Employee's Petition for Appeal is **DISMISSED**.

FOR THE OFFICE:

*/s/ Monica N. Dohnji*  
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MONICA DOHNJI, Esq.  
Senior Administrative Judge

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<sup>15</sup> *Id.*